

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F201034 & F306091

MINNIE BREWER, EMPLOYEE

CLAIMANT

**BRADLEY SCHOOL DISTRICT,
EMPLOYER**

RESPONDENT NO. 1

**RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED MAY 22, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Texarkana, Miller County, Arkansas.

Claimant was represented by Mr. Nelson V. Shaw, Attorney at Law, Texarkana, Texas.

Respondent No. 1 was represented by Ms. Betty J. Hardy, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David Pake, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 25, 2008, the above-styled claim came on for a hearing in Texarkana, Arkansas. A prehearing conference was held in this matter on November 26, 2007, and a Prehearing Order was entered on November 27, 2007. At the hearing, the parties agreed that the Prehearing Order filed November 27, 2007, would be made a part of the record herein as Commission Exhibit "1", subject to any modifications made at the full hearing.

MINNIE BREWER - F201034 & F306091

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including June 4, 2003.
- 3) Respondent No. 1 has accepted and is paying toward a 7% permanent partial disability rating.
- 4) That Claim F306091 is the correct claim number for this matter and recognize only that Claim F201034 was incorrectly referenced in the previous hearings, and at the Court of Appeals.
- 5) Respondent No. 1 and claimant stipulate that claimant has been provided benefits pursuant to the Court of Appeals' Opinion dated September 6, 2006, and that Dr. Rosenzweig was selected by the Commission for an impairment rating.
- 6) The hearing transcript and all exhibits attached thereto from the December 10, 2004, full hearing will be incorporated herein by reference.
- 7) The Full Commission Opinion and Order filed November 28, 2005, and the Court of Appeals' Opinion dated September 6, 2006, regarding this matter are also hereby incorporated herein by reference.

At the full hearing, the parties agreed to litigate the following issues:

- 1) Whether claimant is entitled to medical expenses and payment for prescriptions.
- 2) Whether respondents have been forthcoming with information to the claimant.

MINNIE BREWER - F201034 & F306091

- 3) Whether claimant is entitled to wage loss disability benefits.
- 4) Second Injury Fund liability.

At the full hearing, claimant contended she was entitled to wage loss disability benefits; that she is entitled to have additional medical tests paid for by the respondents; that claimant has incurred reasonable medical treatment with resulting prescriptions that should be paid for by the respondents; and in the event that surgery is recommended due to the job related injury respondents should pay for such surgery.

Respondent No. 1 contended at the full hearing that the claimant has been provided all appropriate benefits to which she is entitled; that respondents have paid claimant's medical expenses as well as TTD benefits and are currently paying PPD benefits; respondents assert that claimant cannot meet her burden of proof that she is entitled to additional benefits beyond those that are being paid; and the respondents alternatively argue that if claimant is awarded wage loss disability, it would be due to a combination of her prior conditions with the June 2003 injury and, therefore would be the liability of the Second Injury Fund.

Respondent No. 2, Second Injury Fund contended, in summary, that it does not have liability in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents,

MINNIE BREWER - F201034 & F306091

and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) Respondent No. 1 has been forthcoming with information to the claimant. Specifically, I find that Respondent No. 1 has committed no wrongdoing with regard to the independent medical evaluation from Dr. Rosenzweig conducted on June 12, 2007. Further, I find that the independent medical evaluation conducted by Dr. Rosenzweig, and found at Respondent No. 1's Exhibit 2 to be valid, and therefore find that the claimant did sustain a 7% whole person impairment as a result of her compensable injury.
- 4) Claimant has reached maximum medical improvement; however, claimant is entitled to continued pain management from Dr. Shahim or to such doctors Dr. Shahim may refer the claimant for pain management. Additionally, claimant has proven by a preponderance of the evidence that she is entitled to all medical treatment related to her back that is contained in the record herein, including but not limited to those services provided by Dr. James Arrington, as such services were pain management and were reasonable, necessary, and related to the claimant's compensable injury. Respondent No. 1 is directed and ordered to pay for all pain management related to the claimant's back contained in the record herein and all future pain management as recommended or referred by Dr. Shahim in the future once those

MINNIE BREWER - F201034 & F306091

bills are properly submitted to Respondent No. 1 for payment. Additionally, although Dr. Shahim is not recommending surgery at this time, should Dr. Shahim in the future recommend surgery related to the claimant's compensable back injury said surgery would also be the responsibility of Respondent No. 1.

- 5) Claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss disability benefits in excess of her 7% whole body impairment rating. Therefore, the issue of Second Injury Fund liability is rendered moot.

DISCUSSION

The claimant sustained two admittedly compensable injuries to her low back while working for Respondent No. 1. The first back injury to the claimant occurred on January 7, 2002, and the second back injury occurred on June 4, 2003. It is the second back injury for which the claimant now asserts she is entitled to additional benefits.

The claimant first requested additional benefits in a hearing on December 10, 2004, and as a result of that hearing this administrative law judge issued an Opinion filed January 31, 2005. As a result of the December 10, 2004, hearing, this administrative law judge awarded the claimant the additional medical treatment she was seeking but denied additional temporary total disability benefits. Thereafter, the Full Commission entered an Opinion that affirmed the award of the claimant's additional medical treatment; however, the Full Commission reversed on the issue of

MINNIE BREWER - F201034 & F306091

temporary total disability benefits and awarded the claimant TTD benefits from November 18, 2003, to a date to be determined. Thereafter, on September 6, 2006, the Arkansas Court of Appeals affirmed the orders of the Full Commission. The parties have stipulated that Respondent No. 1 has complied with the orders of the Full Commission and Court of Appeals. The Court of Appeals' Opinion filed September 6, 2006, and the Full Commission Opinion filed November 28, 2005, were both made a part of the record herein by reference upon agreement of the parties.

The Full Commission Opinion and Order filed November 28, 2005, contains a thorough fourteen page history of the claimant's admittedly compensable injuries and subsequent medical treatment. Said history will not be recited herein word for word, however, as stated said history is incorporated by reference. With regard to the medical treatment issues, the Full Commission agreed with the administrative law judge Opinion that the claimant's medical treatment from Drs. Diamond, Buono, Shahim, and Krishnan were all reasonable and necessary and related to the claimant's compensable back injuries and therefore the responsibility of Respondent No. 1. Subsequent to the December 10, 2004, full hearing, claimant continued to treat with Dr. Shahim and also sought treatment from a Dr. Arrington because Dr. Diamond left her practice in Texarkana. Respondent No. 1 indicated at the full hearing that after the Court of Appeals' decision, Respondent No. 1 paid for a number of visits with Dr.

MINNIE BREWER - F201034 & F306091

Shahim in Little Rock and then at some point discontinued any further treatment.

MR. SHAW: I think it's safe to say she will go wherever she can get some treatment. As of right now, Dr. Arrington and Dr. Diamond were the only ones that she could pay for and go to.

THE COURT: Okay. Well, Ms. Hardy, I mean, the Court of Appeals, and I think it's gone all the way on the additional medical. I think everyone's in agreement that she's entitled to additional medical for the back. You're in agreement with that?

MS. HARDY: That's correct. And Respondents did pay for that after the Court of Appeals decision came down, she treated or she had a number of visits with Dr. Shahim in Little Rock, had a couple of procedures and injections and that sort of thing, so we feel like we did comply with their orders in the past . . .

THE COURT: Okay.

MS. HARDY: . . . and it was our understanding that no additional treatment was recommended by Dr. Shahim, and then based upon the results of Dr.

(T. pp. 79-80, lines 18-25 & 1-13).

At the full hearing, the claimant testified, in essence, that she was simply wanting to continue to be treated for pain management.

MS. BREWER: Well, he told me last week that he was going to try to get me in to see a pain management doctor over in Texarkana.

THE COURT: And you'd like to do that, is that right?

MS. BREWER: Yes, sir.

(T. pg. 86, lines 2-7).

MINNIE BREWER - F201034 & F306091

Respondent No. 1 has indicated, at the full hearing, that it was their understanding that no additional treatment was recommended by Dr. Shahim. However, my review of the medical evidence indicates Dr. Shahim has continuously recommended pain management for the claimant and continues to do so. In Dr. Shahim's August 22, 2006, report, Dr. Shahim states, "I would like to refer her to pain management. She wants to go closer to her house and wants to be referred to Texarkana. I have recommended to her to contact her workers' compensation regarding referring her to a pain management clinic in Texarkana." (Respondent's Exhibit 2, page 46). Further, on January 16, 2007, Dr. Shahim stated, "Since Ms. Brewer's back symptoms have worsened, I have recommended a new MR of the lumbar spine. I will refer her to pain management." (Respondent's Exhibit 2, page 50). Then, on March 13, 2007, Dr. Shahim stated, "I had recommended an MR of the lumbar spine previously that was refused by Worker's Compensation. I have recommended that again today. . . . I will plan on following up with her after the lumbar epidural steroid injection. I have prescribed Ultram for pain." (Respondent's Exhibit 2, page 51). As is clear in reviewing the medical records from Dr. Shahim, he has never completely released the claimant but rather has always continued to recommend pain management. There has been no reason for the respondents to deny this continued pain management to the claimant and respondents are directed and

MINNIE BREWER - F201034 & F306091

ordered to pay for all medical treatment related to the claimant's back from Drs. Shahim and Arrington contained in the record and the future treatment recommended by Dr. Shahim, including but not limited to the epidural steroid injections and the MR of the claimant's lumbar spine.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Arkansas Code Annotated § 11-9-508(a). The claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). As stated earlier, the Full Commission and Court of Appeals have already determined that claimant is entitled to all reasonable necessary and related medical treatment. Dr. Shahim's reports indicate that more pain management is necessary and respondents are ordered and directed to pay for such pain management and the recommendations from Dr. Shahim, as previously ordered by the Commission and the Court of Appeals forthwith. Said pain management includes the MR of the lumbar spine now recommended by Dr. Shahim and any referrals Dr. Shahim may make for the claimant's pain management, including but not limited to referrals to Dr. Arrington. Even respondents' counsel stated at the full hearing that if additional treatment was recommended her client has not controverted that. (Transcript exchange, page 84,

MINNIE BREWER - F201034 & F306091

lines 1-2). However, Respondent No. 1 then goes on to state that at some point they ceased any payments of medical treatment to Dr. Shahim. The Full Commission and the Court of Appeals have already indicated that Dr. Diamond's treatment was reasonable, necessary, and related, and it was clear at the full hearing that Dr. Arrington has stepped in place of Dr. Diamond because Dr. Diamond has left her private practice in Texarkana. Therefore, I find that any treatment to the claimant's back from Dr. Arrington would also be reasonable, necessary, and related to the claimant's compensable back injury.

The claimant has also requested that the issue be addressed as to whether Respondent No. 1 has been forthcoming with information to the claimant. In this regard, claimant primarily points to the independent medical evaluation performed by Dr. Rosenzweig in June of 2007. Dr. Rosenzweig's June 12, 2007, independent medical evaluation is found at Respondent No. 1's Exhibit No. 2 and shows the claimant sustained a 7% whole body anatomical impairment. I find that rating to be valid and I find that Respondent No. 1 has been forthcoming with information to the claimant specifically with regard to the independent medical evaluation. In fact, claimant's counsel stated that Respondent No. 1's counsel did everything asked of her with regard to the independent medical evaluation. (Transcript, page 72, lines 10-18).

The claimant has requested wage loss disability benefits in excess of the 7%

MINNIE BREWER - F201034 & F306091

anatomical rating assessed by Dr. Rosenzweig. The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage loss disability benefits in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience.

In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence, and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961) and Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of

MINNIE BREWER - F201034 & F306091

interest or negative attitude impedes the assessment of the claimant's loss of earning capacity. Emerson Electric v. Gaston, *supra*. In this case, the record reflects that the claimant has had multiple opportunities to partake in a Functional Capacity Evaluation but has failed to do so. Additionally, the claimant testified that when she sustained her compensable back injuries with the Bradley School District she was earning \$728.00 per month. The claimant also testified that she now receives, and has been receiving for some years, Social Security disability benefits in the amount of \$629.00 per month. The record shows that the claimant earns almost as much drawing Social Security disability benefits as she did when she worked for the Bradley School District. The difference in incomes shows that the claimant has no significant monetary motivation to return to work.

Further, the Commission also looks at the medical evidence when determining wage loss disability benefits. The medical evidence in this matter demonstrates that no doctor has given the claimant any work restrictions. Even the claimant testified at the full hearing that no restrictions for her back have ever been given by any doctor.

Q When you gave your supplement deposition back on January 28, 2008 . . . not quite a month ago, you indicated that there were no restrictions for your back from any doctor, is that right?

A Yes.

Q The restrictions that you talked about here today are restrictions

MINNIE BREWER - F201034 & F306091

that you've place [sic] on yourself, is that right?

A That I can't do. That's right.

(T. pg. 56, lines 11-19).

In the instant case, the preponderance of the evidence demonstrates that the claimant has not sustained wage loss disability. The preponderance of the evidence demonstrates that the claimant has reached maximum medical improvement and has not been placed on any work restrictions due to her back. Further, the claimant's post-injury income is very close to the level of income she was making at the time of her compensable injury. Therefore, after considering the claimant's age, education, work experience, medical evidence, as well as her lack of motivation to return to full time work, I find that claimant is not entitled to wage loss disability benefits as a result of her compensable back injury over and above her physical permanent impairment. Since the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss disability benefits, the issue of Second Injury Fund liability is rendered moot.

AWARD

Respondents are hereby directed and ordered to pay all medical treatment to the claimant's back that is contained in the record herein. Further, respondents are directed and ordered to pay for any future treatment from Dr. Shahim and any referrals

MINNIE BREWER - F201034 & F306091

Dr. Shahim should make for pain management, including but not limited to a possible future surgery recommendation.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb